Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

No. 75-911

Frank Douglas Ward ..... *Petitioner*

V.

United States of America ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on October 30, 1975.

JURISDICTION

The judgment of the Circuit Court of Appeals was returned on October 30, 1975. An extension of the time for filing the instant petition was granted on Nov. 26, 1975, extending to December 29, 1975, the time for filing

the instant petition. The jurisdiction of the Court is invoked under 28 U.S.C. Sect. 1254 (1).

QUESTION PRESENTED

Whether the evidence presented against petitioner was sufficient to overcome petitioner's presumption of innocence so that petitioner's constitutional rights, afforded by the 14th Amend. to the Const. of the United States were fully protected.

STATUTE INVOLVED

The statutory provisions involved are 18 U.S.C. 371; 18 U.S.C. 152. They are printed in Appendix A, infra, p.p. .

STATEMENT

Petitioner is a rancher and salesman, having sold furniture and sewing machines over a period of some twenty years. During the later part of 1973, petitioner went to work for Johnnie Slingerland and William Francis Wilson selling sewing machines. Around the first part of 1974 Slingerland and Wilson started a furniture salvage business called Factory Surplus and Freight Sales and Ward, petitioner herein, was hired as a sales manager. His duties were exclusively in the area of sales and sales management.

From the record of the District Court trial it is clear that Ward had *no ownership interest*, (emphasis added) in FSFS. He simply was in charge of sales.

Sometime during March or April of 1974 petitioner decided to leave FSFS and go into the surplus and salvage business on his own in Texarkana, Texas. This location was selected due to better interest rates and better economic conditions as compared to Arkansas and Little Rock in particular.

Petitioner purchased a quantity of furniture from FSFS. He located a business house in Texarkana, Texas. He opened a bank account in "Wards Furniture" and commenced to do business. In the meantime, FSFS had started having financial problems due to the loss by FSFS of their credit line with General Electric credit corporation. FSFS needed the money owed to it by Ward, so Ward, in an effort to create faster sales and a flow of cash, sold three lots of furniture at auction.

Testimony in the record of the District Court trial was to the effect that *all petitioners business dealings were open and above board*, (emphasis added) Petitioners were introduced at the various auctions as the owner of the furniture. The furniture had been advertised by the auctioneers and specifically identified as to description and ownership. The prices brought for the furniture were reasonable and considered fair market prices by the auctioneers. Payments were made by check to petitioner who in turn paid FSFS what he owned them, by check.

Petitioner was never a party to any bankruptcy proceeding involving FSFS, Slingerland or Wilson. Petitioner had no knowledge of any bankruptcy proceeding, was never served with any type of legal document such as a restraining order or injunction and in no way did the acts of petitioner constitute fraud against any creditor of FSFS.

District Court records indicate petitioner left FSFS sometime in March or April of 1974. At the time FSFS was solvent, doing a high volume of business, paying its bills and conducting a normal business operation. *Petitioner had no knowledge of any impending involuntary bankruptcy proceeding to be filed by a small group of creditors of FSFS.* (Emphasis added)

William Francis Wilson testified in District Court that petitioner originally had discussed a "scam" type furniture operation with Wilson and Slingerland. There was *nothing in the record* (emphasis added) to corroborate this, in fact, the record clearly refutes Wilson's testimony in every aspect.

REASONS FOR GRANTING WRIT

I.

Even if petitioner had had knowledge, at one time, of an intended conspiracy, this knowledge is not sufficient to sustain petitioners conviction. In *U.S. v. Falcone*, 109 F. 2d 579 (2d Cir. 1940), affd. 311 U.S. 205, 61 S. Ct. 204, (1940) the Court held that knowledge is not

sufficient for guilt of conspiracy. The Court said "it is not enough that he does not forego a normal lawful activity, of the fruits of which he knows that other will make an unlawful use; *he must in some sense promote their venture himself, make it his own*, have a stake in the outcome."

Petitioner had no stake in the outcome of any venture of FSFS, Slingerland or Wilson. Petitioner had already left FSFS some months previously. Petitioners only interest was in the normal profit he made after the sale of furniture, which he had lawfully purchased, and after paying FSFS what he, petitioner, owed. There were no collateral liens or mortgages attached to any of the furniture purchased by petitioner. The question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abbettor of—the buyer because he knows that the buyer means to use the goods to commit a crime. *U.S. v. Falcone*, 108 F. 2d 579, 581 (2d Cir. 1940)

II.

The acts done by petitioner were not overt acts in furtherance of the conspiracy. Not only must there be an agreement, but also overt acts, whether legal or illegal, must be performed in furtherance of the conspiracy.

As Professor Perkins stated "the substantive acts of one conspirator, *in furtherance of the conspiracy*, must be imputed to his co-conspirators insofar as they were members of the conspiracy *at the time the acts were*

committed." Perkins, "The Act of One Conspirator" 26 Hastings L.J. 337-359 (1974) (emphasis added).

Clearly from the record of the District Court it can be seen that the acts of petitioner could in no way be construed as acts in furtherance of a conspiracy.

III.

There was no "corrupt intent" on the part of petitioner in doing those acts performed by petitioner. Therefore, petitioner cannot be said to be guilty of conspiracy. *Landers v. U.S.*, 299 F. 75 (6th Cir. 1924).

IV.

The holding of the 8th Cir. Court of Appeals that an alleged conspirator can be convicted solely on the uncorroborated testimony of an alleged co-conspirator totally violates the spirit and meaning of the constitutional rights of citizens as afforded by the due process clause of the 14th Amend. To hold such is clearly a judicial procedure for "sticking the head in the sand" and dodging the real issue, the guilt or innocence of a citizen. Even most state courts recognize the danger in such a judicial philosophy, and most states hold that without corroboration a co-defendant can not be convicted on the statement of a co-defendant. There can be no fairness in such a judicial principle that will allow one to be convicted simply on the uncorroborated testimony of an alleged co-defendant.

The due process clause of the 14th. Amend. is not limited to those specific guarantees spelled out in the Bill of Rights but rather contains *protection against practices and policies* which may fall *short of fundamental fairness* without running afoul of a specific provision. (emphasis added.) In re *Winship*, 397 U.S. 358, 377 (1970).

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CARPENTER, FINCH & DISHONGH
1515 Building
Little Rock, Arkansas

Counsel for Petitioner

APPENDIX A

1. 18 U.S.C. Sect. 371—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. Sect. 152—Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or . . . .

APPENDIX B

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1223 September Term, 1975

Filed
October 30, 1975
Robert C. Tucker
Clerk

United States,

Appellee,

vs. Appeal from the United States District Court for the Eastern District of Arkansas

Johnnie Lee Slingerland,
Paul Ray Jarnigan,
William Francis Wilson,

Frank Douglas Ward,

Appellant,

Joseph Micciche, Sr.

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Arkansas and typewritten briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

October 30, 1975

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